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No. 00-1011

In The

Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL.,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

Petitioners challenge the Attorney General's ruling that, as a matter of law, he has no statutory authority to grant petitioners a hearing on their request for relief under 8 U.S.C. 1182(c). The government contends that IIRIRA precludes review in any court, including this Court, of that pure question of law. Petitioners' submission is that IIRIRA can be construed to allow either the court of appeals (in a petition for review) or the district court (under 28 U.S.C. 2241) to adjudicate petitioners' claims, and that a complete prohibition of jurisdiction in any court would violate the Constitution.

The government's brief does not dispute the essential elements of our analysis. The government agrees that the preclusion statute should be construed in light of background presumptions and rules of construction. On that issue, therefore, the disagreement between the parties is over which rule(s) of construction should apply. The government also does not dispute that the Suspension Clause protects the historic role of habeas corpus inquiry over *non*-constitutional claims, at least in the context of federal *executive* detention. Nor does the government disagree that the habeas inquiry historically exercised by this Court to determine the legal validity of a deportation order encompassed constitutional as well as non-constitutional claims.

The government's submission instead rests on the contention that the *particular* type of legal claim raised by petitioners is barred, and that the preclusion of review is unproblematic because it concerns eligibility for discretionary relief. The government argues that the Suspension Clause does not protect that claim because petitioners are "indisputably deportable," because the Attorney General *might* have chosen to deny their requests in the exercise of discretion, and because this Court's habeas review of non-constitutional claims relating to discretionary deportation relief should be disregarded as insufficiently explicit or not constitutionally compelled.

The government's brief does not offer any affirmative authority from this Court's immigration jurisprudence or from the common law history of habeas corpus (in this country or England) supporting the view that petitioners' legal claim falls outside the historic core of habeas scrutiny of non-judicial executive detention. The government's arguments, moreover, are refuted in their entirety by this Court's decision in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), are dependent on conflating the difference between *eligibility* for relief and the *exercise* of discretion, and ultimately hinge on the unsupportable contention that because petitioners are "deportable" within the meaning of the immigration act, the Attorney General could "detain and remove" them without ever adjudicating their claim for relief.

A. *Statutory Construction.* As we explained in our opening brief (at 17-26, 42-49), Section 1252(a)(2)(C) should be construed to preclude the broad scope of "review" that is available for final orders of removal generally, but not the more circumscribed scope of review traditionally provided by habeas corpus.[1] Our construction would permit the courts of appeals to exercise petition-for-review jurisdiction in cases involving aliens removable on the basis of one of the enumerated criminal offenses, but only insofar as the alien raises a claim encompassed by the scope of inquiry traditionally exercised in a habeas corpus action. Alternatively, if petition-for-review jurisdiction were unavailable, the statute should be read to

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[1] Section 1252(a)(2) refers to "Matters not subject to judicial review." Petitioners' opening brief (at 17) inadvertently referred to Section 1252(a)(2)(C) as also using the term "judicial review." As the government correctly notes (at 26), subsection (C) of Section 1252(a)(2), like the other subsections, uses the term "review." Given Section 1252(a)(2)'s reference to "judicial review," use of the shorthand term "review" in its subsections has no significance. In any event, petitioners' submission on the construction of Section 1252(a)(2)(C) does not turn on any difference between the terms "review" and "judicial review."

permit district courts to exercise habeas jurisdiction under 28 U.S.C. 2241 over petitioners' claims. This brief will address only the court of appeals avenue, and will not repeat the arguments supporting district court review made in our opening brief (at 44-49), and more fully in the respondent's brief in *INS v. St. Cyr*, No. 00-767 (at 8-19).

Construing Section 1252(a)(2)(C) to preserve the minimum scope of habeas scrutiny is supported by two lines of authority. The first is this Court's decisions in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), in which the Court refused to find a repeal of its original habeas corpus jurisdiction in the absence of an express directive. The second is the voluminous body of immigration habeas law decided by this Court under the "finality" provisions enacted by Congress between 1891 and 1952, in which the Court repeatedly acknowledged the broad preclusive effect of the finality provisions and yet consistently preserved habeas corpus. *See* Pet. Br. 17-29; *see also* Brief *Amicus Curiae* American Bar Association 11-16, 22-24 (collecting cases). Notably, although the government takes issue with certain aspects of the Court's decision in *Heikkila v. Barber*, 345 U.S. 229 (1953), it does not dispute *Heikkila*'s holding of statutory construction, in which the Court comprehensively discussed and reaffirmed the longstanding rule that the INA's finality provisions should be read to preclude broad APA-type review, but not habeas corpus.

1. The government itself does not urge the Court to read Section 1252(a)(2)(C) to preclude all review. Instead, it reads Section 1252(a)(2)(C) to allow aliens to raise claims challenging whether they fall within the coverage of the jurisdictional preclusion statute, and thus, to challenge whether the BIA correctly concluded that they are aliens who are removable on the basis of an offense listed in Section 1252(a)(2)(C). The government further urges the Court to read

Section 1252(a)(2)(C) to permit aliens to raise constitutional claims challenging their removal order, even if the alien falls within the coverage of Section 1252(a)(2)(C).

The government does not offer a textual basis for its reading of the statute but argues that Section 1252(a)(2)(C) should be read in light of this Court's jurisprudence permitting courts to determine their own jurisdiction (Gov't Br. 21-23) and in light of the jurisprudence concerning review of constitutional claims, which the government reads as establishing an express statement rule permitting review of constitutional claims where "neither the text nor the legislative history of [a] provision adverts specifically to preclusion of review of constitutional claims . . . ." Gov't Br. 23. The government urges this Court to rely solely on its rules of construction, while contending that the Court should not invoke the habeas corpus canons on which petitioners rely.

The government offers no convincing reason for reading Section 1252(a)(2)(C) only in light of the canons on which it relies. Moreover, the government's construction of the statute would not avoid serious constitutional issues. In this case the Court would still be faced with the far-reaching constitutional question of whether pure legal claims can be wholly precluded where an administrative agency has ordered a deprivation of personal liberty.[2]

2. The government relies heavily (at 19-21) on statements made by Senator Abraham in support of its position that the statute precludes even the narrow scope of habeas inquiry. However, the government's own position is inconsistent with the quoted passages, which suggest that

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[2] The cases cited by the government involve benefits, *Weinberger v. Salfi*, 422 U.S. 749 (1975), *Johnson v. Robison*, 415 U.S. 361 (1974), and employment, *Webster v. Doe*, 486 U.S. 592 (1988). In those very different contexts not involving a deprivation of liberty, the Court did not discuss the right to judicial review of non-constitutional claims.

Senator Abraham believed that aliens with certain criminal convictions should be afforded no judicial scrutiny of any claim, including those the government would permit. Furthermore, Senator Abraham's statements appear remarkably similar to the basic thrust of the finality provisions in effect between 1891 and passage of the 1952 Immigration Act. Taken literally, those provisions would have made the administrative determination "final," yet the Court preserved habeas inquiry to ensure that administrative immigration officials acted within the *legal* limits imposed by Congress. Insofar as relevant, Senator Abraham's statements should be understood in light of this pattern of judicial construction, especially given the absence of any suggestion that he intended to ignore this Court's habeas jurisprudence in the immigration area.[3]

3. The government also argues that Section 1252(a)(2)(C) should be construed to preclude all judicial scrutiny of petitioners' legal challenge because that provision is part of a "single, comprehensive package of provisions" in which the "very same aliens" who are precluded from applying for relief from deportation are also precluded from obtaining judicial review. Gov't Br. 17-18. Contrary to the factual premise of that argument, the reach of the jurisdictional preclusion statute is *not* coterminous with the bars on relief. Section 1252(a)(2)(C), by its terms, precludes review in cases involving criminal offenses other than "aggravated felonies."[4]

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[3] To the extent the government relies on the general goal of expediting the removal of aliens with criminal convictions, that goal is not hindered because the INA, as now amended by IIRIRA, no longer precludes courts from reviewing final orders *after* the alien has been physically removed from the country. *See* IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c)).

[4] Section 1252(a)(2)(C) applies to, *inter alia*, *any* two crimes of moral turpitude (where the possible sentence is one year) under INA § 237(a)(2)(A)(i) & (ii) [8 U.S.C. 1227(a)(2)(A)(i) & (ii)], *any* firearm offense

Thus, aliens who are not "aggravated felons" are precluded from obtaining judicial scrutiny of their legal claims under the government's jurisdictional position.

4. The government also points to various provisions of the INA where Congress provided for "judicial review" in habeas corpus proceedings and argues that these provisions show that the term "review" in Section 1252(a)(2)(C) should be understood to apply to habeas corpus. Gov't Br. 27-29. The bulk of the government's structural arguments, however, seek to prove that Congress intended to preclude *district court* habeas proceedings. Insofar as the government's arguments seek to prove that the term "review" in Section 1252(a)(2)(C) must be understood to preclude a narrow habeas inquiry in *any* court, those arguments are unavailing. Structural evidence and negative inferences are insufficient to repeal the scope of habeas inquiry under *Felker/Yerger* and this Court's immigration habeas decisions.[5]

(including failure to register) under INA § 237(a)(2)(C) [8 U.S.C. 1227(a)(2)(C)], and *any* drug offense (including simple possession or abuse) under INA § 237(a)(2)(B) [8 U.S.C. 1227(a)(2)(B)]. *See also* Gov't Br. 22 (noting that Section 1252(a)(2)(C) applies to more than aggravated felons).

[5] Moreover, even in the absence of an express statement rule, the government's structural arguments would be insufficient. The government does not dispute that for more than 60 years this Court consistently preserved habeas corpus in the face of finality provisions that barred judicial review. Rather, the government contends only that a statute foreclosing judicial review need not "necessarily" be construed to preserve habeas corpus. Gov't Br. 28. But even if habeas corpus could be barred without an explicit directive, the relevant inquiry under this Court's finality-era decisions would nonetheless be whether IIRIRA's restriction on judicial review *must* be read to bar habeas corpus, not whether it is possible to read the restriction in that sweeping manner. The government has not made that showing. The habeas provisions on which the government relies each provide for "judicial review" through the *mechanism* of a habeas corpus proceeding. Gov't Br. 27-29 (citing, *e.g.*, 8 U.S.C. 1252(e)(2); former 8 U.S.C 1105a(b); former 8 U.S.C. 1105a(a)(10)). Those provisions do not

B. *The Suspension Clause*. 1. The crux of the government's argument is that because petitioners are concededly "deportable," their legal claim is not protected by the writ guaranteed by the Constitution. Thus, the government asserts that the "fundamental flaw" in our analysis is that petitioners are "unquestionably removable . . . and are seeking the exercise of the Attorney General's power to grant discretionary relief from deportation." Gov't Br. 32. The government's argument is directly contradicted by this Court's ruling in *Accardi* and by the structure and requirements of the deportation process, which do not permit the Attorney General to issue a final order of removal until the application for relief is adjudicated.[6]

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unambiguously establish, however, that every time the INA restricts "review," that restriction must be understood to preclude the *scope* of habeas corpus.

[6] The government's apparent suggestion that the Attorney General's legal ruling is of no consequence because he "could" have exercised his discretion negatively in every case over which he has (erroneously) determined that he lacks discretionary authority, Gov't Br. 32, is contrary to the basic principle that an agency's decision must be defended on the ground on which it was decided. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). An erroneous eligibility determination cannot be defended on the basis of how discretion might have been exercised if the decision-maker had not misconstrued his own authority. *See FEC v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case -- even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (correcting legal error and remanding to Attorney General for discretionary determination). In any case, there is no reason to presume that the Attorney General would unilaterally deny the application of every applicant who would be eligible if he properly understood his statutory authority. In the past, half the applications were granted. Pet. Br. 5. Many of the legal residents barred from eligibility by retroactive application of the new statute would be especially worthy candidates. *See* Brief *Amici Curiae* Florida Immigrant Advocacy Center, *et al.* in *INS v. St. Cyr* 7-20 (collecting cases).

In *Accardi*, an alien who was "admittedly deportable," 347 U.S. at 261-62, and whose ground of deportation was "uncontested," *id.*, brought a habeas corpus action to challenge the denial of discretionary (suspension of deportation) relief. The Court expressly acknowledged the discretionary nature of the relief, *see id.* at 268, but rejected the dissenters' objections that the scope of habeas inquiry did not encompass the petitioner's legal claims. The dissent in *Accardi* raised each of the objections put forth by the government in this case, including (1) that the alien "does not question his deportability," (2) that "the only question" concerned a form of relief over which the ultimate grant or denial rested in the discretion of the Attorney General, (3) that there was no "private right" involved in the request for discretionary relief, and (4) that "no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended." *Id.* at 269-70 (Jackson, J., *dissenting*). This Court rejected those arguments, exercised habeas jurisdiction, and granted relief to the petitioner. The Court explained that it was not "reviewing and reversing the *manner* in which discretion was exercised," but rather, "the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." *Id.* at 268 (emphasis in original).[7]

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[7] *Accardi* is consistent with a long line of habeas decisions in the courts of appeals deciding legal eligibility for discretionary relief, which the government never addresses or refutes. *See* Pet. Br. 25 n.10 (collecting courts of appeals cases). The one such case the government cites is *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (L. Hand, J.). That case concerned a challenge to the *exercise* of discretion. Even in that context, however, Judge Hand explained that habeas would lie if "it affirmatively appears that the denial has been actuated by considerations that *Congress could not have intended* to make relevant." *Id.* at 491 (emphasis added). *A fortiori*, habeas jurisdiction lies to challenge the Attorney General's legal ruling that Congress divested him of all statutory authority to exercise discretion.

The government seeks to avoid the dispositive significance of *Accardi* on the grounds that the Court did not "delineate the scope of the writ" and that it did not expressly state that the habeas review in that case was "compelled by the Constitution." Gov't Br. 39. While the Court did not delineate the scope of the writ in respect to *all* claims, it did expressly hold that habeas corpus encompassed legal claims relating to discretionary relief, which was the entire focus of the dissent. Moreover, the Court's exercise of jurisdiction over the challenge in that case demonstrates that habeas review necessarily encompasses the claim presented here. The petitioner in *Accardi* challenged the BIA's failure to conduct an independent exercise of discretion as required by the regulations, even though the Attorney General had ultimate authority to overturn the BIA's decision. *Accardi,* 347 U.S. at 268. In the present case, petitioners' claim is that the Attorney General has failed to exercise discretion altogether in violation of the statute.

The government's further contention that *Accardi* did not mention the constitutional right to habeas corpus disregards the crucial fact that *Accardi* was decided one year after the Court had ruled in *Heikkila* that the scope of habeas scrutiny of deportation orders was limited to that which was "required by the Constitution." 345 U.S. at 234-35. *Accardi* had no reason to reiterate that point. Moreover, the dissent's discussion in *Accardi* of the scope of habeas corpus began by citing (at 269-70) *Nishimura Ekiu*, one of the key cases on which *Heikkila* based its finding that habeas corpus review of immigration orders was limited to the constitutional minimum. 345 U.S. at 233. In light of the detailed dissent specifically addressing the proper scope of habeas, and the Court's express rejection of those views, *Accardi* cannot be dismissed as a *sub silentio* jurisdictional decision. *Cf. Lewis v. Casey,* 518 U.S. 343, 352

n.2 (1996) (ruling not binding because issue "was neither challenged nor discussed" in prior case).[8]

2. Wholly apart from *Accardi*, the government's contention that petitioners' claim is not a challenge to the legal validity of the deportation order, and hence unreviewable in habeas corpus, is erroneous. First, the claim at issue here concerns legal *eligibility* for discretionary relief, and not the exercise of discretion. The government repeatedly conflates these two distinct inquiries, *see* Gov't Br. 15, 31, 32, which, as noted in our opening brief, the Court has made abundantly clear are analytically and legally separate, *see* Pet. Br. 24-25 (citing *Jay v. Boyd*, 351 U.S. 345 (1956)). The government does not rebut that fundamental point, nor could it. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citing *Jay v. Boyd* and noting distinction between "prerequisites for eligibility" and "unfettered discretion").[9]

In addition, the government's argument is entirely dependent on its suggestion that aliens who are deportable have

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[8] The government's attempt to craft four categories, which exclude petitioners' claim, to describe this Court's finality era cases must fail. Gov't Br. 41. Either the *Accardi* claim -- and therefore also petitioners' -- fits within one of the government's categories (*e.g.*, as a claim asserting deprivation of a "fundamentally fair administrative hearing," Gov't Br. 41) or the categories are artificial and incomplete. As the government effectively concedes, other cases also do not fit within the categories. *See* Gov't Br. 41-42 n.29 (discussing *United States ex rel. Mensevich v. Tod*, 264 U.S. 134 (1924)). *See also Amicus* ABA Br. 16 n.12.

[9] *See also Foti v. INS*, 375 U.S. 217, 228-29 n.15 (1963) ("finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters"); *Chadha v. INS*, 634 F.2d 408, 426 (9th Cir. 1980) (Kennedy, J.), *aff'd*, 462 U.S. 919 (1983) ("Each of the[ ] [statutory] prerequisites [for suspension] requires a legal determination of a traditional sort, the contents of which are explicated by an orderly history of administrative practice and judicial review and interpretation.").

no claim that could be protected by the Suspension Clause. Gov't Br. 33. But insofar as the government is arguing that an alien who is "deportable" can be "detain[ed] and remov[ed]," Gov't Br. 33, without any adjudication of a claim for discretionary relief under Section 1182(c), that assertion is flatly wrong. The finding of deportability is only the initial determination in an immigration proceeding. A deportation order cannot issue until the claims for discretionary relief from deportation have been adjudicated. The Attorney General must determine if the alien is statutorily eligible, and if eligible must adjudicate the application. Only at the conclusion of that process does a final order issue, and only at that point does the Attorney General have authority to remove the alien. *See* 8 C.F.R. 212.3(e) (1996) (requiring that Section 1182(c) application "shall be adjudicated by the Immigration Judge" during deportation proceedings); *Foti v. INS*, 375 U.S. 217, 223 (1963) (holding that a decision on discretionary relief from deportation "[is] an integral part of the proceedings which have led to the issuance of a final deportation order"); *Dessalernos v. Savoretti*, 356 U.S. 269 (1958) (per curiam) (holding that alien is "entitled to have his application for suspension of deportation considered" to determine statutory eligibility); *see also INS v. Chadha*, 462 U.S. 919, 938 (1983) (discretionary relief is a matter "on which the final order is contingent").

Thus, contrary to the government's statements and implicit suggestions, the Attorney General has no legal authority to remove an alien until the relief application has been adjudicated and, if the alien is statutorily eligible, until discretion is exercised. Accordingly, petitioners' claim that the Attorney General has misconstrued the statutory eligibility requirements governing relief goes to the legal validity of the final order, and thus, to the validity of the Attorney General's attempt to remove them. Because the claim goes to the Attorney General's legal authority to remove petitioners, it is reviewable even under the government's understanding of habeas corpus.

See Gov't Br. 33 (stating that habeas corpus involves challenges to the executive branch's "legal authority" to order deprivation of liberty); *id.* at 37 (habeas covers challenges to "legal authority").[10]

3. The government also argues (Gov't Br. 37-39) that the Court's statement in *Heikkila* concluding that the finality provisions had reduced the scope of review to the constitutional minimum was dictum and that *Accardi* (and the other immigration habeas decisions on which petitioners rely) need not be followed because those decisions were not constitutionally compelled.[11] First, as already noted, *Accardi* was decided only one year after *Heikkila*. Thus, whatever dispute there may be over the binding nature of *Heikkila*'s statements regarding the scope of habeas corpus, the effect of the Court's pronouncement on *subsequent* cases such as *Accardi* cannot be disregarded. Second, even assuming that *Heikkila* did not have to rule squarely on the constitutional scope of habeas corpus review, the Court's statements were a central focus of the opinion and were part of a comprehensive discussion of the pre-1952 regime. *Heikkila*, 345 U.S. at 233-

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[10] Other forms of discretionary actions by the Attorney General do not present the same question. For example, the Attorney General's discretion to initiate proceedings in the first place (prosecutorial discretion), or the discretion not to execute a valid final order of deportation after the administrative process has concluded ("deferred action"), are different because they do not affect the validity of the final order and do not have statutory eligibility criteria. *Compare Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-91 (1999). In such instances, the Attorney General can choose whether or not to exercise discretion.

[11] The government's claims about *Heikkila* in this case appear inconsistent with its views in *INS v. St. Cyr*, where it does not contend that *Heikkila*'s statements regarding the pre-1952 regime were dicta. Gov't *St. Cyr* Br. 4 ("This Court ruled that such [deportation and exclusion] orders could be reviewed by writ of habeas corpus, but only to the extent that judicial review was required by the Constitution," citing *Heikkila*).

35. After canvassing the case law and congressional enactments, the Court twice stated that courts could review immigration decisions in habeas only if the review was "required by the Constitution." *Id.* at 235; *see also id.* at 234 (Congress reduced review to the "fullest extent possible under the Constitution").

Third, and most importantly, the government has not demonstrated that the statements in *Heikkila* are incorrect or that the *Heikkila* Court misread the effect of the pre-1952 legislation and this Court's precedents interpreting that legislation. There is no dispute that enactment of the finality provision in 1891 and the subsequent reiterations of it were intended by Congress and understood by this Court to eliminate the courts' role in scrutinizing the expulsion of aliens from the United States. *See* Pet. Br. 19-20 n.8 (collecting cases). Yet the government has not addressed the critical decisions on which *Heikkila* based its analysis, including the first decision interpreting the finality provision, *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). *See* Pet. Br. 18-29 (discussing pre-1952 case law).[12]

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[12] The government notes that *Heikkila* refers to "due process requirements" and implies that the Court may have suggested that the scope of habeas is limited to contemporary procedural due process claims. Gov't Br. 38-39. That would be inconsistent with the scope of review expressly authorized by the Court in the numerous cases cited by *Heikkila* and would also be contrary to Justice Clark's usage of that term. *See Heikkila*, 345 U.S. at 235 (citing *Kessler v. Strecker*, 307 U.S. 22 (1939); *Bridges v. Wixon*, 326 U.S. 135 (1945)). *See also Brownell v. Tom We Shung*, 352 U.S. 180, 182 n.1 (1956) (Clark, J.) ("[D]ue process has been held . . . to include a fair hearing as well as *conformity to statutory grounds*.") (emphasis added); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1393 n.93 (1953) ("Justice Clark must . . . be understood [in *Heikkila*] as saying that the Constitution gives the alien the right, among others, to have the *statutes observed*.") (emphasis added). *See also Amicus* ABA Br. 17 n.13. Indeed, the passage in which the due process language appeared

The government does not offer its own reading of the pre-1952 finality provisions or the Court's decisions interpreting those provisions, except to speculate that those decisions were "presumably" decided on the basis of the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385-86; Rev. Stat. §§ 751-766 (1875), rather than the habeas provision of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82. Gov't Br. 40-41. The government then asserts that the scope of review authorized by the 1867 Act was broader than that authorized by the 1789 Act and suggests that the expansion is somehow relevant here. *Id.*

However, the 1867 habeas legislation did not broaden the scope of habeas review in any respect material to this case. Its main purpose was to extend federal habeas corpus to prisoners in state custody. *See In re Neagle*, 135 U.S. 1, 70-72 (1890); *Ex parte Bridges*, 4 F. Cas. 98, 105-06 (N.D. Ga. 1875) (Bradley, C.J.). In this case, petitioners are raising purely legal claims challenging *non*-judicial *executive* detention by the federal government. Such claims were reviewable both before and after 1867. *See* Pet. Br. 29-34 (collecting cases); Brief *Amici Curiae* Legal Historians 18-28. In fact, the Court's immigration habeas decisions under the pre-1952 scheme relied upon pre-1867 habeas decisions, further undermining any suggestion that the Court viewed its decisions in immigration cases involving legal claims as resting on an expanded scope of habeas attributable to the 1867 Act. *See, e.g., Ekiu*, 142 U.S. at 660-62 (citing, *inter alia*, *Ex parte Bollman*, 8 U.S. (4

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in *Heikkila* concerned only "administrative findings of fact." 345 U.S. at 236. Under this understanding of "due process," the Attorney General's erroneous legal ruling in this case, which deprived petitioners of their right to a Section 1182(c) adjudication and hearing, would constitute a due process violation.

Cranch) 75 (1807)).[13] Thus, even if only the Framers' original understanding and historic practice were relevant to inform the scope of habeas corpus protected by the Suspension Clause (a standard that the Court has not adopted, *see Felker*, 518 U.S. at 663-64), petitioners' legal claim falls within the core protection of the Great Writ.

The government's effort to find support in English common law also fails. The government's central point appears to be that habeas covered only a challenge to the legal authority of the detention and that there is "thin" support for the broader proposition that habeas permitted review of a discretionary determination for abuse of discretion. *See* Gov't Br. 35. But petitioners here raise only a legal challenge, and do not challenge any discretionary action.[14]

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[13] None of the three sources offered by the government (Gov't Br. 40 n.27) supports the proposition that the 1867 Act expanded the scope of review in any way material here. *Felker* and the Liebman & Hertz treatise simply note that the 1867 Act extended habeas jurisdiction to state prisoners. *See Felker*, 518 U.S. at 659-60 (explaining that before 1867 there were only limited "instances in which a federal court could issue the writ to produce a state prisoner"); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 47-48 (3d ed. 1998) (discussing expansions in "federal court review of state court criminal actions"). *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 324 (1868), did not concern the scope of habeas, but rather, the 1867 Act's grant of appellate jurisdiction to the Supreme Court over habeas cases.

[14] In any event, the cases that the government discusses, *see* Gov't Br. 35-36 & n.23, suggest a broader use of the writ in England to permit habeas scrutiny of some discretionary powers. Several of the cases involved an element of discretion, yet the critical fact (which the government ignores) is that in each case the writ issued. *See, e.g., Ex parte Boggin*, 104 Eng. Rep. 484, 484 n.(a) (K.B. 1811); Gov't Br. 36 (discussing *Chalacombe* case in which the court acknowledged the existence of the Admiralty's discretion and *issued the writ*); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778), Gov't Br. 36-37 & n.23 (writ issued in challenge to legality of impressment by sailor lacking statutory immunity who asserted Admiralty's bad faith in failing to honor a non-statutory grant of protection). (continued . . .)

In sum, the government acknowledges that the common law writ necessarily encompassed more than constitutional claims given its English origins, and thus, that the 1789 Act (and common law practice) requires inquiry into the *legal* validity of detention. *See* Gov't Br. 41. Consequently, even under the government's own view of habeas corpus, this case hinges on whether petitioners are challenging the legal validity of their deportation orders. As we have already discussed, that issue is resolved by the nature of petitioners' claims, the structure of the deportation process, and this Court's decisions, particularly *Accardi*.

C. *Due Process and Article III.* 1. The government contends that this Court has already decided that due process does not require judicial review of the type of challenges brought by petitioners. Gov't Br. 42-45. However, the two cases on which the government relies (at 43), *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903), and *Carlson v. Landon*, 342 U.S. 524 (1952), do not support that proposition. In *Yamataya*, habeas review was preserved

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The government suggests that Oaks viewed the writ as narrowly available (Gov't Br. 35 n.21), but omits the remainder of the sentence it quotes ("and that once charged he was either jailed or brought to trial within a specified time"), which makes it clear that the passage refers only to habeas corpus challenging *judicial* detention and only in the criminal context. Oaks, in fact, pointedly notes that use of the writ to challenge *non*-judicial detention "reveals the writ of liberty performing what is perhaps its most essential task: freeing persons from illegal official restraints of liberty not founded in judicial action." Dallin H. Oaks, *Habeas Corpus in the States* -- 1776-1865, 32 U. Chi. L. Rev. 243, 266 (1965). The government's reliance (at 41 n.28) on the Mayers article is misplaced for the same reason, since the article is concerned solely with habeas in the post-conviction context. The government also incorrectly relies (at 41 n.28) on *Ex Parte Watkins*, 342 U.S. (7 Pet.) 568 (1833). There, the writ could not be granted on the excessive fine claim because this Court "ha[d] no appellate jurisdiction to revise the sentences of inferior courts in criminal cases." *Id.* at 574.

and the Court therefore had no occasion to decide whether pure questions of law could be wholly precluded from all judicial scrutiny. 189 U.S. at 98 (citing *Ekiu*). Moreover, even the passage quoted by the government (at 43) states only that review of *facts* could be precluded. *Carlson* did not involve the right to judicial review, but rather a challenge to the Attorney General's power to detain pending deportation (over which there was habeas review). 342 U.S. at 526-28. The sentence of dicta quoted by the government suggests only that the Constitution does not necessarily require broad judicial review of immigration decisions. The Court never suggested, however, that review of legal claims could be precluded and indeed specifically cited to habeas decisions reviewing constitutional and statutory claims. *Id.* at 537 n.27, n.28. *See also Amicus* ABA Br. 18 n.14 (discussing *Carlson*).

The government also offers a variety of unpersuasive factual and legal grounds on which to distinguish petitioners' non-immigration cases. For example, the government suggests that *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), which held that due process requires judicial scrutiny of punitive damage awards, does not support petitioners' right to review of statutory claims because there "the Constitution also prohibit[ed] grossly excessive punitive damages . . . ." Gov't Br. 44. But in *Honda*, as the dissent notes, the Court held that due process required judicial scrutiny of the damage award under *both* federal constitutional *and* state law standards. *See* 512 U.S. at 450 (Ginsburg, J., *dissenting*) (dissenting specifically on ground that due process did not require judicial review of *Honda*'s *state* law claims). *See also* 512 U.S. at 435-36 (Scalia, J., *concurring*) (noting that state law placed a "reasonableness" limit on punitive damages and concluding that the "deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing *state*-prescribed limits upon such

deprivations violates the Due Process Clause") (emphasis added).

In short, the Court has never suggested that due process would permit an administrative agency to order a deprivation of liberty without any judicial scrutiny of whether the agency remained within the legal limits on its power. The government has cited no case to the contrary.

2. The government offers one basic response to petitioners' Article III submission and argues that there can be no right to review protected by Article III because immigration has been placed within the "public rights" category. Gov't Br. 45-47. But the Court has eschewed an inflexible, categorical approach in the Article III area and has thus refused "to make determinative for Article III purposes the distinction between public rights and private rights . . . ." *CFTC v. Schor*, 478 U.S. 833, 853 (1986); *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 586-87 (1985) (not endorsing the view that "Article III has no force simply because a dispute is between the Government and an individual" but has instead required "practical attention to substance rather than doctrinaire reliance on formal categories"). *See* Pet. Br. 41-42. Consequently, petitioners' right to a judicial forum must be evaluated in light of the fundamental values protected by Article III and whether those values are impermissibly compromised by allowing the Attorney General to determine the limits of his own statutory enforcement authority.

In any event, as we also explained in our opening brief (at 41-42), the "public rights" theory does not support the preclusion of review under the circumstances here, where petitioners are not seeking broad APA-review and are raising only a pure legal challenge to a deprivation of liberty. The very nature of the habeas writ and its historic purpose could not be reconciled with the government's view that the public rights

doctrine would allow the preclusion of all judicial scrutiny over a legal claim affecting liberty.

Furthermore, notwithstanding the broad language historically used to describe it, the doctrine has not actually been applied as to preclude *all* review. Indeed, even in *Murray v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and other early cases, nonstatutory mechanisms remained routinely available to permit litigants to seek common law remedies. *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 247 (1990) (noting that in *Murray* review was actually available and stating that it "has never been supposed" that judicial scrutiny of legal claims could be foreclosed in all cases involving an individual and the government); *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.23 (1982) (pre-*Schor/Thomas* Article III decision applying a categorical approach but nonetheless noting that elimination of *all* "Art. III judicial review" (including appellate review) would still raise constitutional concerns).

CONCLUSION

For the reasons set forth above and in our opening brief, if the district courts lack habeas jurisdiction over petitioners' claims, the judgment of the court of appeals should be reversed to allow petitioners' claims to be adjudicated in the court of appeals by petitions for review.

Respectfully submitted,

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